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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

No. 567 [redacted]

LEON NASH,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

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LEON NASH,

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REASONS FOR GRANTING THE WRIT

POINT I

THE COURT OF APPEALS ERRONEOUSLY PLACED UPON PETITIONER THE BURDEN OF SHOWING THAT PREJUDICE RESULTED TO HIM FROM THE SIXTH AMENDMENT AND RULE 24(c) VIOLATION. IT IS CLEARLY IN CONFLICT WITH THE FOURTH CIRCUIT AND IGNORES THE TEACHING OF *CHAPMAN v. CALIFORNIA*, 386 U.S. 18 (1967)

In its Brief in Opposition (Gov't. Br. p.11), the Government acknowledges

that Rule 24(c) of the Federal Rules of Criminal Procedure was violated. However, it tries to belittle such violation by claiming that, "The record refutes any claim of prejudice," when, in truth, the record does no such thing. The Government thus states as fact the following (Gov't. Br. p.11):

> "At all times the three alternates were kept separate from the jury. They were given a separate room, and separate marshals were assigned to them with the obligation under oath of making sure that no one spoke to them. Marshals assigned to the regular jury took the same oath (N. 59-60). There is nothing to suggest that the marshals in any way failed to carry out their responsibilities (N. 59-60; Pet. No. 567, App. A 13). Cf. *United States v. Virginia Erection Corp.*, 335 F. 2d 868 (C.A. 4)."

This contention is at war with the record. The Government has no factual basis for its contention, and it can only be referring to the trial judge's instructions and the oaths taken by the jurors and marshals (59a-60a).*

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* References with the suffix small "a" are to petitioner's Appendix in the Court of Appeals, which has been filed with the Clerk of the United States Supreme Court.

Indeed, the Government has now belatedly conceded that the alternate and regular jurors ate in the same restaurant and slept in the same hotel (Petition, p.9), which are two of the factors of prejudice enunciated by the Court of Appeals (Petition, App. A, p.13). Furthermore, the Court of Appeals acknowledged that, "Eacn time during their deliberations that the regular jurors came into the courtroom for further instructions and were seated in the jury box, the alternates were also in the jury box" (Petition, App. A, p.13). The record itself refers to only one "van" between the courthouse and the hotel (69a). Thus, the Government's statement that the alternate and regular jurors were kept separate "at all times" is clearly incorrect.

The Government assumes that the instructions of the court were obeyed by all jurors and marshals and that there were no oral communications among the alternate and regular jurors. However, as the Fourth Circuit noted in *United States v. Virginia Erection Corporation*, 335 F.2d 868, (4th Cir. 1964):

> "Whether, in fact, alternate Sublett obeyed the instructions of the court is not revealed by the record. It is, of course, possible that he could have remained silent during the deliberations. However, if he heeded the letter of the court's instructions and remained *orally* mute throughout, it is entirely possible

> that his attitude, conveyed by facial expressions, gestures or the like, may have had some effect upon the decision of one or more jurors." (Emphasis in original).

The Government is now in effect arguing that petitioner has the burden of showing that the United States marshals and jurors violated their oaths. How could petitioner possibly have shown this at the time of trial? He was not present when the jury deliberated, or when it ate, or when it was at a hotel on two nights, or when it rode back and forth between the courthouse and the hotel. Obviously, such elements of prejudice would not appear in the record. Is petitioner required to contact each of the marshals and jurors and ask them whether they obeyed their oaths and fulfilled their duties? If so, is it realistic to expect that they would admit that they violated their oaths and did *not* fulfill their duties?

It is the *Government* which has the burden of showing beyond a reasonable doubt that no prejudice resulted to petitioner from the Sixth Amendment and Rule 24(c) violation. By placing such burden on the petitioner, the Court of Appeals was in error. As this Court noted in *Chapman v. California*, 386 U.S. 18 (1967):

> "...the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there

> was no injury or to suffer a reversal of his erroneously obtained judgment. There is little, if any difference between our statement in *Fahy v. Connecticut* about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our *Fahy* case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

That a constitutional error of Sixth Amendment dimensions occurred is beyond dispute, as is the fact that the Government was the beneficiary of such error (Petition, App. A, p.12). It should be noted that upon oral argument before the Court of Appeals, the Government argued that petitioner had the burden of showing lack of prejudice because of an alleged presumption of regularity that the marshals carried out their oaths. To this assertion, Judge Kaufman responded that he thought there was a presumption of irregularity.

The Government impliedly acknowledges the existence of conflict between the Circuits on this issue when it prefaces its citation of *United States v. Virginia Erection Corporation, supra,* with the abreviation "Cf." The language of that case (Petition, pp.10-11) is clear in not tolerating a violation of Rule 24(c). The Fourth Circuit refused to accept the "attempt of court and counsel to circumvent the established rule and to substitute unauthorized procedures." This was in spite of the fact that counsel for both the Government and the defendants there agreed to the attempt to avoid the Federal Rules of Criminal Procedure. That Court noted that the requirement of trial by jury "contemplated by Article III, Section 2, and the Sixth Amendment is a trial by a jury of twelve persons, *neither more nor less*" (emphasis in original). It further noted that "Twelve is the magic number" and that "no rule makes provision for a jury of *more* than twelve" (emphasis in original). It said that the purpose of Rule 24(c) is to "make further provision for preserving the constitutional jury of twelve to which a defendant is entitled." That Court further noted:

> "The Committee history leading to the formulation and adoption of Rule 24 discloses that the United States Supreme Court Advisory Committee on Rules of Criminal Procedure seriously considered the possibility of permitting an alternate juror to replace a regular juror who becomes disabled

> *during* the jury's deliberations but rejected it after the desirability and constitutionality of such a procedure had been questioned by the Supreme Court." (Emphasis in original).

The Government further tries to minimize the violation of the Constitution and the Federal Rules of Criminal Procedure by saying (Gov't Br. p.11):

> "Furthermore, this question is not likely to recur, since the court below made it quite clear that the district courts should adhere strictly to the discharge requirements of the Rule...."

Is the Government trying to say that the petitioner should be deprived of his constitutional rights because others may be accorded such rights in the future? To follow this path would reward clear error and will tempt other courts to ignore Rule 24(c). After all, the trial judge acknowledged that he was deliberately violating Rule 24(c), and in doing so he took note of the most explicit defense objections that could be made (60a-61a) (thus making the error even more pronounced than in *United States v. Virginia Erection Corporation, supra,* where the consent of counsel for both sides was denounced by the Fourth Circuit).

POINT II

THE GOVERNMENT HAS FAILED TO JUSTIFY THE COURT'S REFERENCE TO THE ADDED EXPENSE OF A RE-TRIAL AS PART OF THE *ALLEN* CHARGE

Petitioner contends that the trial court should not have referred to the added expense of a re-trial as part of its *Allen* charge. The Government, however, claims this instruction did not emphasize the expenses of the Government alone (Gov't. Br. p.12). While it is true that the expenses of the Government alone were not emphasized, such was the clear import of the instruction; the only financial stake of the jurors would be in their role as taxpayers and it was to the jurors' pocketbooks that this instruction was directed. This is why petitioner strongly objects to such an instruction, although it may be couched in seemingly neutral language. It is one thing for the expense of a re-trial to be used, without mentioning it, to justify an instruction to try to reach a verdict; it is another matter to refer specifically to such added expense.

POINT III

THE GOVERNMENT HAS ALSO FAILED TO JUSTIFY THE UNDUE PRESSURE EXERTED BY THE TRIAL COURT ON THE JURY TO REACH A VERDICT

Petitioner contends that the trial court should not have accepted partial verdicts over explicit defense objections

shortly before midnight on the third night of deliberations. The defense had asked that the jury be given an additional night's rest and be permitted to resume its deliberations the next day. This request is supported by a case which the Government cites on its behalf, namely, *United States v. Minieri*, 303 F.2d 550 (2nd Cir. 1962), cert. denied 371 U.S. 847 (1962) (Gov't. Br. p.14), where it was said:

> "Finally, Minieri contends that the trial judge coerced the jury by offering at 12:00 midnight, after they had deliberated for nine hours, to seclude them for the night so that they could resume their deliberations the next day. There is no merit to the contention....
>
> "The period for which the jury is to be kept together is in the discretion of the trial judge....In *United States v. Olweiss*, 138 F.2d 798, 800-801 (2 Cir., 1943), motion to file petition for certiorari denied, 321 U.S. 744, 64 S.Ct. 483, 88 L.Ed. 1047 (1944), the jury returned after two hours of deliberation and announced that it was hopelessly divided. This court found no coercion on the part of the trial judge when he sent the jurors back for further deliberation, saying to them,

'You may also have all day tomorrow and the next day if you want it.' In *United States v. Commerford*, 64 F.2d 28 (2 Cir.), cert. denied 289 U.S. 759, 53 S. Ct. 792, 77 L.Ed. 1502 (1933), after the jury had deliberated for seven hours, the judge recalled them and said:

"'I have called you in, gentlemen, to tell you that I think you ought to make every possible effort to come to an agreement at least upon some of the charges, one or more, and to make all the progress you can towards that end. In the event that you can not, it will be necessary that you be taken up to the hotel for the evening, and resume your deliberations in the morning....'"

POINT IV

THE GOVERNMENT HAS FAILED TO EXPLAIN WHY THE TRIAL JUDGE ANNOUNCED TO THE JURY THAT HE HAD DENIED PETITIONER'S MOTION FOR AGQUITTAL

The Government (Gov't. Br. p.15) alleges that the trial court explained its rulings on the defense motions at the close of the Government's case to the jury so that they "might be acquainted with the narrowing of the

issues previously outlined to them." If this were the case, the trial court could simply have informed the jury that, "I remove from your consideration Counts _____ as to defendant _____ _____." However, the trial court saw fit to inform the jury that it had denied the motions of petitioner. Precisely what this had to do with the alleged purpose of narrowing the issues is difficult to fathom.

CONCLUSION

FOR THE REASONS STATED ABOVE, THE WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: November 4, 1968
New York, N. Y.

Respectfully submitted,

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